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No. 09-1559

Supreme Court, U.S.
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In the
Supreme Court of the United States

FRED CURTIS,

Petitioner,

v.

DONALD WAYNE GOOD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

Respondent's Brief establishes that the questions presented by Petitioner should be reviewed by this Court. Specifically, review is warranted in regard to whether an allegation of evidence fabrication or manipulation sounds in substantive or procedural due process and whether a police officer may be held liable for the presentation at trial of constitutionally infirm evidence which was previously held by a reviewing judicial intermediary to satisfy all constitutional requirements.

Respondent does not dispute that splits exist among the Circuits regarding the questions presented in the Petition. To the contrary, he simply ignores the divergent authorities and takes the tact of asserting that, despite said conflicts, certiorari should be denied because this case does not present the appropriate factual background to address same. Resp. Brief at 12-18. However, Respondent's contention is not based on his actual due process claim, but upon other allegations unrelated to the questions presented to this Court. In any event, despite his protestations to the contrary, Respondent's brief establishes that certiorari should be granted because, in opposing same, he has implicated the same important federal questions which were at issue in *Pottawattamie County v. McGhee*. Sup. Ct. R. 10.

Respondent has the burden to show that a state action deprived him of a "specific constitutional guarantee" in order to recover under 42 U.S.C. § 1983. *Paul v. Davis*, 424 U.S. 693, 700 (1976). However, he never attempts to identify the "specific constitutional guarantee" allegedly violated by Petitioner, i.e., either

the substantive or procedural protection of the Due Process Clause. Indeed, Respondent makes no mention of procedural or substantive due process whatsoever and never addresses the very point at issue: whether he must demonstrate a real and palpable harm to the fairness of his underlying criminal trial in order to state a viable claim for a violation of his due process rights. Stated another way, the distinction is between whether the creation of the evidence itself is a constitutional harm or whether § 1983 provides relief only where the use of that evidence has resulted in constitutional harm to the trial itself. While this Court has previously rejected the existence of a substantive due process claim when a plaintiff asserted that he was "subjected to criminal charges by an affirmative, deliberative act of a state official[,]" the Respondent essentially seeks to repackage such a claim and, instead of referring to it as "malicious prosecution," portray the "deliberative act of a state official" as the constitutional tort of being "framed," with no focus on the actual impact that such act had on the fairness of the accused's trial. *Albright v. Oliver*, 510 U.S. 266, 314 (1994) (Stevens, J., dissenting); *see Heck v. Humphrey*, 512 U.S. 477, 479, 484 (1994) (claims police and prosecutors knowingly destroyed exculpatory evidence and "caused an illegal and unlawful voice identification procedure" to be used at trial have their "closest analogy" to malicious prosecution).

Further, Respondent does not seriously dispute that the Second and Third Circuits have adopted a standard governing the recognition of superceding causation in § 1983 cases distinct from that utilized in the decision below. In fact, it may largely be the result of the aforementioned split in due process authority that differing causation standards have begun to

emerge in cases where trial proceedings are a key component of the alleged violation.

Simply put, Respondent's arguments against review have no merit for the reasons hereinafter discussed.

A. Respondent's Distortions Of The Record Cannot Reconcile The Split Among The Circuits Identified by Petitioner Or Their Direct Applicability To The Respondent's Claim

Respondent's due process claim is based upon his allegation that Petitioner framed him "by manipulating a photo for a photo lineup to produce a false identification from an eyewitness[.]" Pet. App. 7a. As a result, Petitioner addressed the split that exists among the circuits regarding due process claims premised on the fabrication or manipulation of evidence. Petition at 12-29. However, even though it is undisputed that the Respondent's claim is based upon the alleged photo manipulation, he makes repeated references to other wrongs allegedly committed by Petitioner: allegations of Fourth Amendment violations, allegations of *Brady* violations, and allegations which, while less than celebratory, do not implicate a constitutional harm at all. Resp. Brief at 7, 8-9, 10, 14, 15-16, 17, 19; *contra Hartman v. Moore*, 547 U.S. 250, 262 n.9 (2006) ("No one here claims that simply conducting a retaliatory investigation with a view to promote a prosecution is a constitutional tort."). All of these issues, however, are irrelevant to the narrow questions presented to this Court for

certiorari.[1] As a result, regardless of the spurious allegations repeatedly made by Respondent, the key question remains: whether a violation of the Respondent's due process rights occurred if he nevertheless received a fair trial?[2] The answer to this question varies from circuit to circuit, and thus merits review by this Court.

B. Respondent Incorrectly Contends That His Due Process Rights Were Necessarily Violated

Apparently unwilling to directly address whether his claim implicates substantive or procedural due process, Respondent argues that this Court should approve the implicit substantive due process violation adopted in the decision below. *See* Resp. Brief at 8-16. Specifically, he contends that his allegation that Petitioner darkened his photograph which was used in a photographic lineup is a *de facto* violation of his right to receive a fair trial regardless of whether that alleged act actually resulted in the creation of evidence which failed the applicable constitutional test (i.e., made his trial constitutionally infirm). *See* Resp. Brief

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[1] The validity of these other claims, including whether they were previously asserted, may be addressed by the lower courts after this Court's disposition of the questions presented herein.

[2] Respondent makes several allegations that Petitioner gave false testimony during his criminal trials. *See, e.g.*, Resp. Brief at 9, 10, 11, 14, 17. However, Petitioner's trial testimony is in the summary judgment record and establishes that he was never questioned in any trial about the appearance of the photographic lineup. To the contrary, the lineup was admitted at trial without objection through the testimony of the victim. In any event, Petitioner has absolute immunity relating to his trial testimony. *Briscoe v. LaHue*, 460 U.S. 325, 332 (1983).

at 11. Such a standard simply adopts a substantive due process test without expressly identifying it as such, as doing so would openly admit the circuit split that Petitioner has accurately identified.

Tasked with trying to downplay and distinguish the circuit split, Respondent raises various attacks, none of which reconcile the Ninth and Seventh Circuit formulations, *nor* the distinct *effect* that the application of either test would have upon the viability of his claims. *Inter alia*, the Respondent claims that:

> (1) the facts in this case are distinguishable because he alleges that Petitioner *acted* knowingly and intentionally. *See* Resp. Brief at 9-10. *But see McCann v. Mangialardi*, 337 F.3d 782, 786 (7th Cir. 2003) (rejecting a claim alleging the "deprivation of liberty from a prosecution and a contrived conviction ... *deliberately obtained* from the use of *false evidence*" because such a "claim is, in essence, one for malicious prosecution" rather than a viable claim sounding in substantive due process.) (emphasis added);[3]
>
> (2) some of the cases cited by Petitioner are inapposite because they are not § 1983 cases addressing assertions of qualified immunity.[4]

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[3] Further, such a standard risks reviving the subjective component of qualified immunity rejected by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 815-16 (1982).

[4] *Inter alia*, Respondent cites *Alexander* as a case which does not address qualified immunity. Resp. Brief at 12-13. However, while the words "qualified immunity" do not appear in *Alexander*, it affirms dismissal because the plaintiff "failed to identify evidence

See Resp. Brief at 12-13. *But see McMillian v. Johnson*, 88 F.3d 1554, 1570 n.22 (11th Cir. 1996) ("[t]o the extent that Tate argues that we must look solely to § 1983 cases to discover clearly established law, his argument is frivolous. . . . Constitutional standards [do not] vary depending on whether a constitutional violation is alleged in a criminal proceeding or a § 1983 action"); and

(3) Respondent's underlying criminal trial was unfair due to an alleged *Brady* violation committed by Petitioner. However, neither the district court nor the decision below ever identified a *Brady* claim in this case, and *Brady* is unrelated to the specific claim at issue in the question presented to the Court. *See* Pet. App. 1a-42a; Resp. Brief at 4, 14-16;[5] Pet. App. 7a (identifying Respondent's claim of evidence manipulation).

Ultimately, the split between the Seventh and Ninth Circuit formulations, which mirrors the question presented herein, is whether a plaintiff situated as the Respondent herein has the burden of establishing that he suffered an independent constitutional harm during his criminal trial upon which his § 1983 claim is based. In *McGhee*, which Respondent makes a futile attempt to distinguish, the plaintiffs' underlying convictions had been reversed due to a *Brady* violation. *McGhee v. Pottawattamie*

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of any constitutional violation." *Alexander v. City of South Bend*, 433 F.3d 550, 555 (7th Cir. 2006). This is a precise element that must be satisfied to overcome qualified immunity. *Pearson v. Callahan*, 129 S. Ct. 808, 816 (2009).

[5] *See supra* note 1.

County, Iowa, 547 F.3d 922, 925 (8th Cir. 2008), *cert. granted* 129 S. Ct. 2002 (2009), *cert. dismissed* 130 S. Ct. 1047 (2010). In other words, by the time those plaintiffs brought suit under §1983, it was established that they had received a constitutionally unfair trial. *Id.* While issues of absolute prosecutorial immunity were implicated, the Eighth Circuit decided the case on *qualified immunity* principals. *Id.* at 932. The legal dispute, therefore, focused on what constitutional rights were violated based upon allegations that evidence fabricated by prosecutors had resulted in an unfair trial.[6] *Id.* On certiorari, the issue of whether the fabrication of evidence constitutes an independent substantive due process claim *was* at issue, as the respondents argued, *inter alia*, for the recognition of such a claim in order to circumvent any assertion of absolute immunity by the prosecutors. Merits Brief of Respondents, *Pottawattamie County v. McGhee*, (No. 08-1065), p. 24, *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-1065_Respondent.pdf. Thus, while the Court's resolution of this point in *McGhee* would have implicated additional issues of absolute prosecutorial immunity, the underlying dispute regarding the very existence of such a constitutional claim at all was presented and argued to this Court. As a result, the underlying *legal* issue in *McGhee* was the same as it is here because absolute prosecutorial immunity could have been implicated only if the due process harm at issue occurred at trial, i.e. sounded in procedural, rather than substantive, due process.

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[6] Of course, causation would remain an element of § 1983 liability.

This case, like *Alexander* and *McCann*, differs factually from *McGhee* because there has been no pre-suit finding of a constitutionally unfair trial. For example, *Alexander* dealt with a plaintiff exonerated by DNA evidence, just as Respondent was *Alexander*, 433 F.3d at 552. When Alexander brought claims virtually identical to Respondent's, the Seventh Circuit held that he had the burden of establishing that his trial had, in fact, been unfair in order to prove his due process claim–something unnecessary in *McGhee* since constitutional harm at trial had already been established and, in any event, the Eighth Circuit recognized a substantive due process claim. *Alexander*, 433 F.3d at 555; *McGhee*, 547 F.3d at 925; *see also Wray v. City of New York*, 490 F.3d 189 (2d Cir. 2007) (constitutional harm established in underlying habeas corpus proceeding); *McCann*, 377 F.3d at 788 (plaintiff was unable to provide any evidence that alleged *Brady* violation occurred and harmed his criminal trial); *cf. Jean v. Collins*, 221 F.3d 656, 663 (4th Cir. 2000) (en banc) (Wilkinson, J., concurring). Here, just as in *Alexander*, no court either in this case or the underlying legal proceedings has ever found that Respondent's criminal trial was constitutionally unfair and, as a result, that fact is not pre-established for the purpose of Respondent's claim. *See Ex parte Good*, No. AP-75,042, 2004 WL 3259016 (Tex. Crim. App. Nov. 17, 2004).

Faced with this procedural history, Respondent seeks to avoid the requirement that Petitioner caused his *trial* to be unfair because such a requirement would implicate the same test the *Alexander* court found unsatisfied: this Court's *Brathwaite* test governing whether the use of a lineup procedure at trial violates an accused's due process right to a fair

trial. *Alexander*, 433 F.3d at 555. The only way to do this is to argue in favor of a substantive due process claim, as recognized by the Ninth Circuit in *Devereaux v. Abbey* and implicitly adopted in the decision below. 263 F.3d 1070, 1074-75 (9th Cir. 2001) (en banc). However, the Seventh Circuit formulation has expressly rejected such a constitutional claim. *McCann*, 337 F.3d at 786; *Alexander*, 433 F.3d at 555; *Newsome v. McCabe*, 256 F.3d 747, 752 (7th Cir. 2001).

This Court's precedents have strongly resisted transforming substantive due process into a "font of tort law." *Paul*, 424 U.S. at 701. Further, this Court recognized in *Albright* that the due process protections described by *Mooney* were procedural in nature. *Albright*, 510 U.S. at 273 n.6 (plurality opinion); *Albright*, 510 U.S. at 283 (Kennedy, J.). Respondent cites no precedent of this Court which would indicate the contrary. As a result, the precedents of this Court strongly suggest that the procedural due process component of the Fourteenth Amendment protects an accused from the fabrication of evidence. Nonetheless, circuit courts are irreconcilably split over how to properly determine whether a plaintiff with a claim such as Respondent's has "ma[d]e out a violation of a constitutional right." *Pearson*, 129 S. Ct. at 816. As a result, certiorari should be granted to resolve this continuing dispute which subjects police officers and other government officials (including prosecutors) in different circuits to different standards of potential civil liability.

C. Respondent Incorrectly Asserts That No Split Exists Among the Circuits Regarding An Officer's Liability After A Judicial Intermediary Determines That The Evidence Presented Satisfies Constitutional Scrutiny

At the outset, Respondent incorrectly asserts that "Petitioner argues that the photographic lineup was not unduly suggestive[.]" Resp. Brief at 16. This is simply untrue. What is undisputed, however, is that the state judge in the Respondent's criminal case examined the very lineup prepared by the Petitioner and *he* held that it was not unduly suggestive. Pet. App. 44a.

While Respondent attempts to assert that no circuit split exists, he ignores the basis for the diverging paths followed by the circuit courts. Specifically, the circuit split, culminating with *Wray*, addresses when an intervening judicial act insulates a police officer from liability *despite* his alleged wrongdoing. *See Zahrey v. Coffey*, 221 F.3d 342, 352 n.8 (2d Cir. 2000). On a generalized level, the split involves the issue addressed in *Egervary v. Young* and the decision below. Specifically, despite Respondent's contentions to the contrary, *Egervary* follows the Second Circuit and adopts a causation standard which recognizes that even when a police officer was "clearly a cause" of the plaintiff's harm, the conduct of a judicial officer provided with the "appropriate facts" who nonetheless improperly applies the governing law is a superceding cause which precludes liability on the part of the police officer. 366 F.3d 238, 250-51 (3d Cir. 2004). While *Egervary* requires that the judicial officer not be misled as to "relevant facts," the Third Circuit is clear that the facts which the judicial officer must be

apprised of are those that are relevant to his application of the law. *Id.* at 250. The decision below paints with a much broader brush, refusing to recognize a superceding cause when there is "any misdirection" of the reviewing magistrate, regardless of its relevance to the magistrate's legal decision. Pet. App. 12a.

Wray is the prime example of the circuit split, as the decision below and the Second Circuit reached completely different results on identical facts. In *Wray*, the Second Circuit held that the erroneous admission of a suggestive identification by the court relieved the police officer who created the identification procedure from liability. *Wray*, 490 F.3d at 192 93, 195. The decision below reached the opposite result even though the state judge had ruled that the lineup prepared by Petitioner, assumed at summary judgment to be unduly suggestive, "was not suggestive in its composition[.]"[7] Pet. App. 44a. While Respondent argues that there is not a split among the circuits but rather a distinction grounded in his allegations that Petitioner's actions were intentional and misled the judge regarding the lineup's creation, he points to no authority whatsoever which supports his assertion that the intent of the officer who creates a lineup is relevant when a judge looking at the very same photographic lineup determines whether its appearance and composition is suggestive. Resp. Brief at 16-17. To the contrary, the relevant authority suggests the opposite. *Thiggpen v. Cory*, 804 F.2d 893,

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[7] This procedural assumption is, of course, only true for the first element of the *Brathwaite* test, not the entirety of the test. *Manson v. Brathwaite*, 432 U.S. 98, 112-14 (1977).

895 (6th Cir. 1986) ("deterrence of police misconduct is not the basic purpose for excluding identification evidence[,]" it is only "the likelihood of misidentification that violates a defendant's right to due process").

The split, then, is that the decision below would hold that a police officer must allocute all potentially nefarious motiviations regardless of relevance to the evidentiary test the court is to perform, while the Second and Third Circuits recognize a superceding cause in any instance where the "appropriate facts," in this case the very lineup at issue herein, that are relevant to the legal test performed have been presented to the reviewing judge. *Egervary*, 336 F.3d at 250; *see Wray*, 490 F.3d 189; *see Townes v. City of New York*, 176 F.3d 138, 146-47 (2d Cir. 1999). As a result, certiorari is appropriate to resolve this intercircuit dispute.

Respectfully submitted.

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